Public Prosecutor v Wong Kok Wah @ Wah Chai

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO J–09–46 OF 1998
NH CHAN, AHMAD FAIRUZ AND HAIDAR JJCA
8 DECEMBER 1999

Criminal Procedure *— Trial — Close of defence's case — Prosecution and defence did not make submissions — No application by defence to submit before court — Whether defence had right to address court at close of defence's case — Criminal Procedure Code (FMS Cap 6) s 174*

The respondent was charged in the sessions court under s 4 of the Firearms (Increased Penalties) Act 1971 for exhibiting a firearm. After a full trial before the learned sessions court judge, the respondent was convicted and sentenced to imprisonment for life and six strokes. The respondent appealed to the High Court and the learned High Court judge held that counsel for the respondent should have been given the opportunity to address the sessions court at the close of the respondent's case and a retrial before the sessions court was ordered. The appellant appealed.

Held, allowing the appeal:

Under s 174 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), the power vested in the court for the prosecutor and the counsel for the accused to submit was a discretionary one. The accused or his counsel, however, may sum up his case if the accused gives evidence or witnesses are examined on his behalf. From the record of the proceedings, the prosecution and the defence counsel put in written submissions to the learned sessions court judge at the close of the case for the prosecution. At the close of the defence case, neither the prosecutor nor the defence counsel made submissions and there was nothing on the record also to show that either of them made an application to the learned sessions court judge to do so. Therefore, the issue that the respondent's counsel's opportunity to address the court was denied did not arise. It appeared that the learned sessions court judge came to his decision soon after the case for the defence was closed. In that respect, no injustice was caused to the appellant as the prosecutor did not make a submission at all (see pp 612H–613B). In the circumstances, the learned High Court judge should have invoked s 422 of the CPC that the failure of the learned sessions court judge to invoke his discretion to invite them to submit did not occasion a failure of justice so as to warrant for a new trial to be ordered by him (see p 613G–H).

Obiter:

If one party was allowed to submit then the other party should be allowed to submit as it was of fundamental importance that justice should both be done and be manifestly seen to be done (see p 613F).

[Bahasa Malaysia summary

Responden telah dituduh di mahkamah sesyen di bawah s 4 Akta Senjata (Penalti Lebih Berat) 1971 kerana menunjukkan senjata api. Selepas perbicaraan penuh di hadapan hakim mahkamah sesyen yang arif, responden telah disabitkan dan dihukum penjara seumur hidup dan enam sebatan. Responden telah merayu kepada Mahkamah Tinggi dan Hakim Mahkamah Tinggi yang arif memutuskan bahawa peguam untuk responden sepatutnya diberikan peluang untuk berhujah di hadapan mahkamah sesyen pada penghujung kes responden dan perbicaraan semula di hadapan mahkamah sesyen telah diarahkan. Perayu telah merayu.

Diputuskan, membenarkan rayuan tersebut:

Di bawah s 174 Kanun Acara Jenayah (FMS Bab 6) ('KAJ'), kuasa yang dimiliki oleh mahkamah bagi pihak pendakwa dan peguam untuk berhujah adalah kuasa budi bicara. Namun, tertuduh atau peguamnya, boleh menyimpulkan kesnya jika tertuduh memberikan keterangan atau saksi-saksi disoal bagi pihaknya. Daripada rekod prosiding-prosiding, pihak pendakwaan dan peguambela telah membuat hujahan bertulis kepada hakim mahkamah sesyen yang arif di akhir kes pendakwaan. Di akhir kes pembelaan, pihak pendakwaan dan peguambela tidak membuat hujahan-hujahan dan tiada apa-apa di dalam rekod yang menunjukkan bahawa salah satu daripada mereka telah memohon kepada hakim mahkamah sesyen untuk berbuat demikian. Oleh itu, isu bahawa peluang peguam responden untuk berhujah di depan mahkamh tidak timbul. Adalah ditunjukkan bahawa hakim mahkamah sesyen yang arif telah mencapai keputusannya selepas kes untuk pembelaan ditutup. Berkenaan dengan itu, tiada ketidakadilan telah berlaku ke atas perayu-perayu kerana pihak pendakwa tidak membuat hujahan langsung (lihat ms 612H–613B). Di dalam keadaan-keadaan tersebut, hakim Mahkamah Tinggi yang arif sepatutnya membangkitkan s 422 KAJ bahawa kegagalan hakim mahkamah sesyen untuk menggunakan budi bicaranya untuk meminta mereka untuk berhujah tidak membawa kepada berlakunya kegagalan keadilan sehinggakan menjustifikasikan perbicaraan baru diarahkan olehnya (lihat ms 613G–H).

Obiter:

Jika satu pihak dibenarkan untuk berhujah, maka pihak yang lain patut dibenarkan untuk berhujah oleh kerana ia adalah kepentingan asas bahawa keadilan mestilah dicapai dan mesti jelas diperlihatkan tercapai (lihat ms 613F).]

Notes

For cases on defence, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3340–3344.

Cases referred to

Lee Kong Yin v PP [1970] 2 MLJ 205 (refd)
Mahindar Singh v PP [1941] MLJ 230 (refd)
Monteiro v PP [1964] MLJ 338 (refd)
PP v Abang Abdul Rahman [1982] 1 MLJ 346 (refd)
PP v H Parnaby [1953] MLJ 163 (refd)
PP v Seeralan [1985] 2 MLJ 30 (refd)
R v Sussex Justices, ex p McCarthy [1924] 1 KB 256 (refd)
Shaari v PP [1963] MLJ 22 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 174, 422
Criminal Procedure Codes (Straits Settlements) s 184
Firearms (Increased Penalties) Act 1971 s 4

Appeal from:

Zauyah Bee bte Loth Khan (Deputy Public Prosecutor) for the appellant.
Gan Ping Sieu (*Gan & Zul*) for the respondent.

Haidar JCA (delivering judgment of the court): This is an appeal by the Public Prosecutor against the order of the learned High Court judge at Muar allowing the appeal by the respondent whereby he set aside the conviction and sentence imposed by the learned sessions court judge. He ordered a retrial.

From the grounds of judgment of the learned High Court judge, it seemed clear that though a number of grounds were canvassed by the respondent's counsel he allowed the appeal only on one ground namely, the learned sessions court judge failed to allow the respondent's counsel to submit at the close of the case for the defence (p 4 of the appeal record).

The respondent was charged in the sessions court at Batu Pahat, Johor under s 4 of the Firearms (Increased Penalties) Act 1971 (Act 37), for exhibiting a firearm, that is, a Smith & Wesson .38 Special No 321J80, in a manner which may likely put fear of death in the commission of a scheduled offence, to wit, preventing himself from arrest by a police officer, that is, Inspector Abdul Khalib bin Abdul Rahman, on 19 October 1988 at about 1.15 pm at Batu $^1/_2$ Jalan Kluang-Mersing, Kluang.

After a full trial before the learned sessions court judge, the respondent was convicted and sentenced to imprisonment for life and six strokes. The respondent was successful in his appeal before the High Court to the extent that a retrial before the sessions court was ordered by the learned High Court judge. As stated earlier, the appeal was allowed solely on procedural ground.

The issue is whether the learned High Court judge was right in the order that he made. In other words, the only point in this appeal is whether counsel for the respondent should have been allowed to address the learned sessions court judge whereas the learned High Court judge held that

counsel for the respondent should have been given the opportunity to address the sessions court at the close of the respondent's case. A

Counsel for the respondent relied on two cases namely, *Mahindar Singh v PP* [1941] MLJ 230 and *Lee Kong Yin v PP* [1970] 2 MLJ 205 in support thereof.

In *Mahindar Singh v PP*, the reported judgment of Terrell Ag CJ was rather short. The learned Ag CJ merely said that the failure to give an opportunity to the accused's counsel to address the court at the close of the case constituted a serious irregularity and ordered a new trial. The report does not disclose whether or not any evidence was led for the defence. Whether the serious irregularity could be cured by s 422 of the Criminal Procedure Code (FMS Cap 6) was never considered by the learned Ag CJ. B C

In *Lee Kong Yin v PP*, the facts showed that the learned president of the sessions court allowed the prosecution to submit, despite objections of defence counsel, on the statement made from the dock by the accused but refused the defence counsel to submit on the matter. Sharma J had this to say at p 207A: D

> The refusal by the learned president to the defence counsel to address the court on a matter in which the learned president allowed the prosecution to address it on the face of it appears unjust and this I think was not a proper exercise of the discretion by the learned president. It was obviously unjust and it is consequently unnecessary to consider whether actually any prejudice was caused to the accused or not. E

Lee Kong Yin, is a Malacca case and at that time the Straits Settlements Criminal Procedure Code was applicable to Malacca. However, Sharma J agreed that the provisions of s 184 of the Straits Settlements Criminal Procedure Code are not the same as those of s 174 of the Criminal Procedure Code (FMS Cap 6). In the event *Lee Kong Yin*'s case really can be distinguished with the present case. F

The relevant section in this case is s 174 of the Criminal Procedure Code (FMS Cap 6) which reads:

> In summary trials under this Chapter:
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> (i) The officer conducting the prosecution need not open the case but may forthwith produce his evidence. G
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> (ii) When the accused is called upon to enter on his defence, he or his advocate may before producing his evidence open his case stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution, and if the accused gives evidence or witnesses are examined on his behalf may sum up his case. H
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> (iii) The officer conducting the prosecution shall have the right of reply on the whole case when the accused has adduced evidence.

Under s 174 of the Criminal Procedure Code (FMS Cap 6), it appears that the power vested in the court for the prosecutor and the counsel for the accused to submit is a discretionary one. The accused or his counsel, however, may sum up his case if the accused gives evidence or witnesses are I

examined on his behalf. From the record of the proceedings, the prosecution and the defence counsel put in written submissions to the learned sessions court judge at the close of the case for the prosecution (see pp 41 to 51 of the appeal record). It seems clear from the record that at the close of the defence case neither the prosecutor nor the defence counsel made submissions and there is nothing on the record also to show that either of them made an application to the learned sessions court judge to do so. Therefore the issue of opportunity to address the court was denied to the counsel did not arise (*Monteiro v PP* [1964] MLJ 338); (*PP v Abang Abdul Rahman* [1982] 1 MLJ 346). It appears that the learned sessions court judge came to his decision soon after the case for the defence was closed. In that respect, no injustice was caused to the appellant as the prosecutor did not make a submission at all. It would be otherwise if the prosecutor was allowed to submit but the defence was not allowed to do so as in the case of *Lee Kong Yin*. Unless the record taken down by the learned sessions court judge is impugned, we can only go by the record (*PP v Seeralan* [1985] 2 MLJ 30).

No doubt, it has been the practice in courts below to allow counsel to submit at the close of the case for the prosecution, such right however, has been held to be at the discretion of the court. As was said by Bellamy J in *PP v H Parnaby* [1953] MLJ 163 at p 166:

> Although in practice a magistrate generally hears both sides on a submission of no case to meet at the close of the case for prosecution, he is in my view, not bound to do so.

To sum up, we would respectfully state:

(a) the right of the prosecutor and the defence counsel to submit in a summary trial is a matter for the discretion of the court, unless the accused gives evidence or calls witnesses to give evidence in his behalf in which case the accused or his counsel may sum up his case,

(b) if one party is allowed to submit then the other party should be allowed to submit as it is of fundamental importance that justice should both be done and be manifestly seen to be done (*R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256).

In respect of this case from the record both the prosecutor and the defence counsel did not submit and neither did any of them apply to submit and the question of refusal by the learned sessions court judge for both or either of them to do so did not arise. In the circumstances the learned High Court judge should have invoked s 422 of the Criminal Procedure Code (FMS Cap 6) that the failure of the learned sessions court judge to invoke his discretion to invite them to submit did not occasion a failure of justice so as to warrant for a new trial to be ordered by him (*PP v Abang Abdul Rahman*; *Shaari v PP* [1963] MLJ 22). It was unfortunate though that s 422 of the Criminal Procedure Code (FMS Cap 6) was not brought to the attention of the learned High Court judge in the appeal before him and quite naturally it was not accordingly considered by him as reflected in his written judgment.

Having heard counsel for the respondent on the merits of the case, we were not convinced that the learned sessions court judge erred or was wrong in convicting the respondent and to pass the sentence of imprisonment for life and ten strokes.

For the reasons stated, we allowed the appeal of the Public Prosecutor and set aside the order of the learned High Court judge. We affirmed the conviction and sentence by the learned sessions court judge.

Appeal allowed.

Reported by Chin En Tek